**STRUKTURMAS (SELANGOR) SDN. BHD.**

**v.**

**MAJLIS PERBANDARAN PETALING JAYA**

HIGH COURT, KUALA LUMPUR
TUAN EE CHIN SENG JC
[CIVIL SUIT NO. S1-22-488-91]
23 SEPTEMBER 1992

***INJUNCTION: Granted ex parte - Defendant restrained from taking possession of property or evicting plaintif - Whether injunction should be extended till trial - Hearing inter partes - Serious questions to be tried - Whether questions arising from the facts serious questions to be tried - Draft management agreement between the parties - Whether evidence of concluded and enforceable contract - Acceptance of rental after breach by plaintiff - Whether defendant estopped - Balance of convenience - Whether it lay in favour of the plaintiff - Plaintiff in possession of premises - If plaintiff dispossessed - Whether greater injustice would be brought to bear on it - Whether monetary compensation would be sufficient - Whether status quo should be maintained.***

An application was made for the extension until trial of an injunction granted *ex parte* to the plaintiff, restraining the defendant from taking possession of the Sports complex and Swimming complex and certain other areas at Kelana Jaya in Petaling Jaya owned by the defendant, or from evicting the plaintiff from the property.

The facts of the case were as follows, the plaintiff was appointed under two agreements to manage the complexes for a period of two years. Before the expiry of the term, the plaintiff applied for an extension of the management agreements for a further period of 15 years. By a letter dated 5 September, the defendant agreed to extend the agreement for a period of 12 years. Five draft management agreements passed between the parties. The 5th draft agreement was accepted by a representative of the defendant. The acceptance was confirmed by a letter dated 26 August 1989 from the plaintiff, and early execution requested. The plaintiff continued to make payments to the defendant. By a letter dated 16 March 1990, the defendant wrote to the plaintiff revising the terms on which the extension of the management agreements were to be granted. The plaintiff claimed that the revision constituted a breach of the contract concluded earlier. The defendant claimed that the agreements were conditional. The plaintiff also based its claim on an estoppel, that by its conduct in accepting payment of the rental after the expiry date of payment, the defendant was estopped from making time for payment of rental an essential term of the agreements.

**Held:**
The injunction should continue until trial.

**[1]** The pleadings read together with the evidence adduced so far, though incomplete, clearly disclosed serious questions that required to be tried. The plaintiff's claim in the action was not frivolous or vexatious, and the plaintiff had a real prospect of succeeding in its claim for final relief.

a. *Question of a concluded contract*

The question arose as to whether a concluded agreement was arrived at between the parties. The plaintiff had *prima facie* made out an enforceable contract between itself and the defendant. The defendant had not denied in any of its affidavits the claim by the plaintiff that an agreement had been concluded between the parties. As such, the claim must be taken to have been admitted. There was abundant evidential backing for the plaintiff's claim for an injunction on the point that there was a concluded contract. And the attempt by the defendant to alter the terms could amount to a breach of the contract on which a good cause of action could be based.

b. *Question of estoppel*

The question whether the plaintiff ought to succeed on a cause of action supported by an estoppel was essentially one of the facts that had to be determined after the hearing of oral evidence that was tested by cross-examination. The test to be applied is whether it is unjust, unconscionable or inequitable for the defendant to go back upon an assumption which he has knowingly or unknowingly caused or permitted the plaintiff to make. In the present case, the test has to be applied to the allegation contained in the statement of claim which the defendant had clearly traversed.

**[2]** The balance of convenience lay squarely in favour of the plaintiff. The *status quo* should be maintained. The plaintiff was in possession of the premises in question. If the plaintiff were to be dispossessed, greater injustice would be brought to bear upon it so that an award of monetary conpensation would not be a sufficient remedy in the event that it succeeded at the trial. On the other hand, any injury that befell the defendant in consequence could readily be remedied by an award of damages against the plaintiff.

*[Order made in terms of the plaintiff's application]*

**Cases referred to:**

*Mohamed Zainuddin Bin Puteh v. Yap Chee Seng [1978] 1 MLJ 40, p. 42* ***(foll)***

*Mothercare Limited v. Robson Books Limited [1979] 5 FSR 466* ***(foll)***

*American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504* ***(foll)***

*Alloy Automative Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] 1 MLJ 382 / [1986] 1 CLJ 2* ***(foll)***

*Lim Keng Siong & Anor. v. Yeo Ah Tee [1983] 2 MLJ 39 / [1983] 1 CLJ 233* ***(foll)***

*Dawson's Bank Limited v. Nippon Menkwa Kabushiki Kaisha LR 62 IA 100 at 108* ***(foll)***

*Lim Teng Huan v. Ang Swee Chuan [1992] 1 SCR 249 (PC)* ***(foll)***

*Si Rusa Beach Resort Sdn. Bhd. v. Asia Pacific Hotels Management Pte. Ltd. [1985] 1 MLJ 132, p. 136 / [1984] 2 CLJ 13* ***(foll)***

*Holiday Inns Inc. & Anor. v. Hotel Enterprises, Ltd. [1976] 1 MLJ 213* ***(foll)***

*Films Rover International Ltd. & Ors. v. Cannon Film Sales Ltd. [1987] I WLR 670* ***(foll)***

**Legislation referred to:**

Indian Evidence Act 1872, s. 115
Evidence Act 1950, s. 115

*For the plaintiff - Philip Choong (Sri Ram with him); M/s. Philip Choong & Co.*
*For the defendants - Alex Charles (N. Chandran with him); M/s. Alex & Rakan-rakan*

## JUDGMENT

**Ee Chin Seng JC:**

This is an application by a summons in chambers dated 30 October 1991 (Encl. 3) taken out by the plaintiff in this action for an injunction restraining the defendant from (and here I quote from the first prayer in the summons) "taking possession of the Sports Complex, Swimming Pool Complex and other areas held under Lot 1772, Taman Subang, Petaling Jaya, Selangor Darul Ehsan covering an area approximately 56,500 square meters (hereinafter called "the said property") or from evicting the plaintiff from the said property". The summons first came on for hearing *ex-parte* before Anuar J., in chambers on 6 November 1991 and his Lordship granted an *ex-parte* injunction in the terms prayed for in the summons until the hearing and disposal of the summons *inter-partes*.

The relevant cause papers having been served on the defendant and there having been an exchange of affidavits, the summons came on for hearing *inter-partes* before me.

The question which I have to decide at this stage is whether the injunction granted *ex-parte* by Anuar J., should continue until trial of the action. Since an extension of the *ex-parte* injunction is being sought, I called on the plaintiff to open its case on the application.

Some of the crucial points relevant to the determination of the dispute between the parties are, as disclosed by the affidavits, in serious dispute. However, certain salient facts which are not in contest may be shortly stated.

The defendant, which is the local authority in and for Petaling Jaya, owns a sporting and recreational complex at Kelana Jaya. The facilities, for the purposes of this suit, may be conveniently separated into 2 categories, namely, the Sports Complex and the Swimming Pool Complex. In fact, this is the nomenclature assigned to these respective premises by the parties themselves in their pleadings.

It is not in dispute that on 24 April 1987, the defendant appointed the plaintiff to manage the Sports and the Swimming Pool Complexes under 2 agreements in writing of that date for a period of 2 years commencing on 15 January 1987 and expiring on 14 January 1989. About 8 months before the scheduled expiry of the respective management agreements the plaintiff wrote to the defendant (by a letter dated 28 May 1988 produced as Exhibit "F-3" under the affidavit of Foo Sae Heng dated 28 October 1991) asking for an extension of those agreements for a further period of 15 years.

By letter dated 5 September 1988 (Exhibit "F-4") the defendant wrote in the following terms:

> Ruj Kami:(52)dlm.MPPJ/P/KB/KT 19
> Tarikh: 5 September 1988
>
> Pengarah
> Gembina Sdn. Bhd.
> 163 Jalan SS 2/24
> 47300 Petaling Jaya
>
> Tuan,
>
> **KOMPLEKS SUKAN DAN KOMPLEKS KOLAM RENANG MAJLIS PERBANDARAN PETALING JAYA DI KELANA JAYA**
>
> Saya diarah merujuk kepada rayuan tuan untuk melanjutkan masa kontrek pengurusan bagi kompleks-kompleks tersebut di atas dan sukacita memaklumkan bahawa Majlis ini pada dasarnya bersetuju tempoh kontrek di antara Majlis dengan syarikat tuan dilanjutkan untuk tempoh 3 tahun pada permulaan dan diperbaharui, tiap-tiap pembaharuan tempoh masa adalah 3 tahun sehingga tempoh maksima tidak melebihi 12 tahun tertakluk kepada syarat-syarat (terms) yang akan ditetapkan oleh Majlis yang akan diberi kelak.
>
> Sekian, terima kasih.
>
> "**CINTAILAH BAHASA KITA**"
>
> Saya yang menurut perintah,
>
> t.t.
> **(HJ. RASTAM SHAHROM BIN DATO HAJI ABD. RAUF)**
> **BPC., PJK.**
> b.p. Yang Dipertua

Following this letter there passed between the parties 5 draft management agreements all of which are produced under the plaintiff's affidavit dated 28 October 1991. The events following the exchange of the fifth draft agreement are described in paragraph 11 of that affidavit in the following terms:

> 11. Following the collection of the fifth draft Agreement by the plaintiff from the defendant's office a meeting took place on 8 August 1989 between the plaintiff's representative Encik Y.C. Yong and the defendant's representative Encik Mutalib. At the said meeting the plaintiff's representative confirmed the acceptance of the fifth draft Management Agreement drafted by the defendant. By a letter dated 26 August 1989 from the plaintiff to the defendant the plaintiff confirmed the acceptance and in acceptance of the final draft for the new Management Agreement and requested for its execution as soon as possible. A copy of the letter dated 26 August 1989 is now produced and shown to me marked as Exhibit "F-11".

A similar averment appears in paragraph 12 of the plaintiff's statement of claim dated 28 October 1991 (Encl. 1).

At this stage, it is important to note that in the several affidavits filed on behalf of the defendant there is no mention made of paragraph 11 of the plaintiff's affidavit. Further, in paragraph 4 of the statement of defence (Encl. 14) dated 16 May 1992 the defendant has admitted paragraph 12 of the statement of claim with the qualification that the extension of the management agreements was conditional.

After 26 August 1989 (being the date of the letter referred to in paragraph 11 of the plaintiff's affidavit) the plaintiff continued to make payments to the defendant which the plaintiff alleges was unconditionally accepted by the defendant.

By a letter dated 16 March 1990 (Exh. "F-13") the defendant wrote to the plaintiff revising the terms on which the extension of the management agreements were to be granted. The plaintiff has taken issue with this and claims that the revision constitutes a breach of a contract concluded earlier in terms of what has been set out in paragraph 11 of its affidavit to which I have already adverted. The plaintiff also bases its claim on an estoppel which is set out in paragraph 14 of the statement of claim and reads as follows:

> 14. Further and or alternatively the defendant has by its conduct in accepting payment of the plaintiff's rental after the expiry date of payment impliedly waived and or acquiesced to or estopped from making time for payment of rental as an essential term of the Sports Complex Agreement and Swimming Pool Agreement.
>
> **PARTICULARS GIVING RISE TO ESTOPPEL**
>
> (a) The said Sports Complex Agreement and Swimming Pool Agreement and the first, second, third, fourth and fifth draft Management Agreements provided for:
>
> (i) payment of rental by the plaintiff to the defendant on or before the 14th day of each calendar month.

(ii) without prejudice to the defendant's right to terminate the agreement under Clause 5(4) imposition of the interest at the rate of 18% per annum from any monthly payment received after the 14th day of the month.

(iii) termination of the Sports Complex and Swimming Pool Agreement in the event the plaintiff fails to pay the defendant on the 14th day of each calendar month.

(b) the plaintiff has since the execution of the Sports Complex Agreement and Swimming Pool Agreement on 24 April 1987 paid rental to the defendant within 14 days from the expiry date of each month i.e. 14 days from the 14th day of each calendar month.

(c) The defendant has unconditionally accepted such payments of rental by the plaintiff without the imposition of interest.

Disputes later arose between the parties in consequence of which the plaintiff, on 29 October 1991, took out a writ supported by a statement of claim and obtained the injunction on 6 November 1991.

I have given this matter my utmost consideration. I have considered submissions made by both learned Counsel and have carefully read the affidavit evidence filed by the parties. After taking into account all relevant considerations I came to the conclusion that the injunction ought to continue until trial and that there should be an early trial of this suit. Accordingly on 29 September 1992, I made an order extending the injunction until the disposal of the suit. I was at the same time prepared to immediately fix an early date, say in January or February 1993 for the trial of this action. When I was about to make an order to that effect I was informed by Counsel for the plaintiff that directions will have to be taken on the usual summons and that the plaintiff would move me immediately after that for a trial date. Further, Counsel for the defendant indicated that his client would be applying for further argument. Such an application was in fact made but I declined further argument and issued a certificate to that effect because I had been addressed at length both orally and in writing and I was of the view that there was nothing further that could be added to what had already been said on the matter. I now give my reasons for my decision.

In deciding whether I ought to accede to the plaintiff's application to continue the injunction, I went through the steps so lucidly set out by his Lordship Hashim Yeop A. Sani J., (as he then was) in *Mohamed Zainuddin Bin Puteh v. Yap Chee Seng* [1978] 1 MLJ 40. This is what his Lordship had to say at p. 42 of the report:

> The traditional theory underlying the grant or refusal of interlocutory injunction has always been that the Court abstains from expressing any opinion upon the merits of the case until the trial - see *Wakefield v. Duke of Buccleugh* [1865] 12 LT 628. However more recently the Courts have displayed what some refer to as a more robust approach, i.e. an approach guided by the apparent strength or otherwise of the plaintiff's case as disclosed in affidavits. In 1970 in *Cavendish House (Chettenhan) Ltd. v. Cavendish-Woodhouse Ltd.* [1970] RPC 234 Harman LJ (with Salmon LJ concurring) said:
>
> > Therefore you start off with a *prima facie* case. That, of course is the essential prelude to the granting of interlocutory relief.
>
> This approach has not been abolished by the House of Lords in the *American Cyanamid* case and new principles have been set out in the following sequence. Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be proper for the Court to take into account any tipping in the balance as revealed by affidavits.
>
> In *Fellowes v. Fisher* (CA) [1975] 3 WLR 185 Lord Denning discussed the *American Cyanamid* case and said that we are no longer to ask whether the plaintiff has made a *prima facie* case and that all we need ask now is the question whether there is a serious question to be tried. If there is, then we should take measures to preserve the *status quo* until the trial. In the *American Cyanamid* case the House of Lords held that there were serious questions to be tried and that on the balance of convenience, the right course was to grant an interlocutory injunction. The traditional rule of starting off with the test of *prima facie* case should no longer be applied. In fact the House of Lords in that case stated that they were taking the opportunity to declare that "there is no such rule". In *Hubbard v. Pitt* [1975] 3 All ER 10 CA Lord Denning again said of the principles involved that the first question to be

asked is simply whether there was a serious question to be tried in the sense that the claim was not frivolous or vexatious. Secondly, if the plaintiffs were to succeed at the trial, whether they would be adequately compensated for the interim continuance of the defendant's activities. Conversely is the question that if the defendants were to succeed at the trial, whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed. The Judge then considers the balance of convenience, and if the relevant factors were evenly balanced the Court should grant an interlocutory injunction which would maintain the *status quo*. It is said that at that stage the Court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits.

Following the steps laid down in *Mohamed Zainuddin (supra)* I began first by asking myself the question as to whether there was a serious question to be tried. In dealing with that question I derived much assistance from the judgment of Megarry V.C. in *Mothercare Limited v. Robson Books Limited* [1979] 5 FSR 466 where the learned Judge, when dealing with *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 All ER 504 said (at p. 473):

Speaking with all the respect and deference that is due from a Judge sitting at first instance to a unanimous decision of the House of Lords (and rather more), I would suggest that the phrase "frivolous and vexatious" in the *American Cyanamid* case should be read and understood in a sense somewhat different from its sense as used in relation to striking out actions as being frivolous or vexatious, and as resembling, rather than affecting, the natural meaning of the other two phrases, "a serious question to be tried" and a "real prospect of succeeding". On that footing, I do not think that Mr. Waite's admission that the plaintiff company's claim was not frivolous or vexatious affects the matter; for he made it plain that he was contending that there was no serious question to be tried and that the plaintiff company had no real prospect of succeeding at the trial. I should add that Mr. Alexander, in his reply, made it clear that he did not wish to reply in any technical sense on the admission made by Mr. White, and that in any case his contention throughout was that the plaintiff company had far greater prospects of success than was needed merely to escape a charge of being frivolous and vexatious.

I do not think that there is any authority that precludes me from reaching this conclusion. The authorities that I have been referred to or have looked at produce a mixed result. In *Hubbard v. Pitt* [1976] QB 142 at 189, Orr LJ states the question as being whether there was "a serious question to be tried in the sense that the claim was not frivolous or vexatious"; and **Halsbury's Laws of England**, Vol. 24 (4th ed. 1979), p. 538 is the same effect. On the other hand, the other authorities all refer to the test without mentioning "frivolous or vexatious". Browne LJ and Sir John Pennycuick in *Fellowes & Son v. Fisher* [1976] QB 122 at 138, 140, state it in terms of a "serious question to be tried". "Real prospect of succeeding" is supported by Lord Denning M.R. and Lane LJ in *Smith v. I.L.E.A.* [1978] 1 All ER 411 at 418, 426, by Stamp LJ. in *Hubbard v. Pitt, supra,* at p. 183, and by Slade J. in *Re Lord Cable* [1977] 1 WLR at 19. Doubtless there are other authorities on the point, but I think it can be said that there is at least a tendency to make no reference to "frivolous or vexatious", and to rely on one of the other two expressions by itself. In view of the possibilities of misunderstanding that the term "frivolous or vexatious" appears to offer unless accompanied by explanatory words I would hope that it might disappear from general use in this context.

Now if I am wrong on this, the plaintiff company has plainly established a case that is not frivolous or vexatious, and so is over the first hurdle. But if I am right, what standard is laid down by "a serious question to be tried" and "real prospect of succeeding", and has the plaintiff company attained this standard? Looking at the *American Cyanamid* case as a whole, it is clear that the House of Lords was laying down a procedure which would avoid what had become something of a practice of holding a trial in miniature when the motion was heard, conducted on affidavit evidence which often conflicted. To discover whether the plaintiff had made out a *prima facie* case of succeeding at the trial (and *a fortiori* if a strong *prima facie* case had to be established) there had to be a detailed investigation of the plaintiff's prospects of success, and the weighing of them to see whether they were greater than his prospects of failure. This now no longer is done, save only as a matter of last resort, if all else turns out to be evenly balanced. Instead, the prospects of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the plaintiff has prospects of success which, in substance

and reality, exist. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails; for he can point to no question to be tried which can be called "serious", and no prospect of success which can be called "real".

What, then, of the plaintiff company's prospects in the present case? I am not required to quantify them in any way. As Megaw LJ said in *Alfred Dunhill Ltd. v. Sunoptic S.A.* [1979] FSR 337 at p. 373, "It is irrelevant whether the Court thinks that the plaintiff's chances of success in establishing liability are 90 per cent or 20 per cent". There are points in the plaintiff company's case which seem to me to be points of difficulty, both on fact and on law; but I do not think I need discuss these. I find it impossible to say that the plaintiff company has no real prospect of success, or that there is no serious question to be tried. Whatever sympathy may be felt for the defendant company, the plaintiff company has a case which is arguable and real. In my judgment, the plaintiff company has satisfied the first of the *Cyanamid* requirements.

In my judgment the pleadings read together with the evidence adduced thus far and which, I might add is incomplete at this stage having been untested by cross-examination in the usual way, clearly disclose serious questions that require to be tried. I am satisfied that the plaintiff's claim in this action is not frivolous or vexatious and that the plaintiff has a real prospect of succeeding in its claim for final relief.

At this stage it is not proper for me to go into the merits of the matter. However, it is necessary to demonstrate, by reference to one or two points, that there are serious questions to be tried.

Firstly, the question arises as to whether a concluded agreement was arrived at between the parties. The plaintiff claims that an agreement in terms of the fifth draft had been concluded between the parties at a meeting held on 26 August 1989. As I have said earlier, this allegation is contained in paragraph 11 of the plaintiff's affidavit which I have produced *in extenso*. The defendant has not denied this allegation in any of its affidavits.

It is settled law that where allegations are made in an affidavit by one party and these are not met or answered by his opponent, then, those allegations must be taken to have been admitted: *Alloy Automative Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382. Applying that proposition to the present case, I am of the opinion that the plaintiff has *prima facie* made out an enforceable contract between itself and the defendant. That being so, the subsequent attempt by the defendant to alter the terms of the contract already concluded and to impose upon the plaintiff fresh terms in contradiction with the terms already agreed upon would, in my judgment, amount to a breach of contract. I hasten to add that I am not in so saying making any finding that the defendant is indeed guilty of a breach of contract. I am merely demonstrating that the facts when considered in their proper context disclose a good cause of action based on breach of contract and therefore raise a serious question to be tried.

The defendant's contention that the parties were merely negotiating is met squarely by the evidence to which I have already referred. That contention also cannot hold good in law by reason of the decision of the Federal Court in *Lim Keng Siong & Anor. v. Yeo Ah Tee* [1983] 2 MLJ 39 where, Abdul Hamid FJ (now Lord President) expressed the applicable principle in this way:

> Mr. Abraham adopts two lines of arguments ... first: cases on "subject to contract" relied upon by the appellants are not applicable to the present appeal for reasons ...
>
> (a) that the letter of 1 March 1976 did not form part of the evidence as it was not tendered as an exhibit; it was from the appellants to the estate agent and it was not from the respondent to the appellants;
>
> (b) the agreed sale price concluded on 3 March 1976 was different from the sale price quoted in the letter. The purported term or condition, if any, which the appellants want it to be read as containing in the phrase "subject to contract" cannot be introduced in a subsequent event;
>
> (c) the rejection by the learned Judge of the view advanced by the appellants to the effect that the term "subject to contract" indicated that the appellants did not intend to conclude the contract until the

> execution of the proper documents and that this letter formed part of the transaction and the term should be read with and into the terms of the other letters as well as the respondent's pleadings.

There is substance in the argument. The letter of 1 March 1976 may well have been a starting point leading to the further events that followed. Too much cannot, we think, be read into the letter other than an expression by the appellants to sell the said land at the price quoted subject of course to a contract to be concluded. It makes sense because no negotiation had yet taken place. It was otherwise after Mr. Chan (PW2) had, pursuant to a negotiation with the appellants on 3 March 1976 secured the agreement of the appellants to sell the said land on terms orally agreed between them.

The second, in fact, the main line of the respondent's argument is that the position of the parties falls into the second category of the exposition given by Mr. Justice Parker in *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284 at pp. 288-289 where it stated -

> It appears to be well settled by the authorities that if the documents or letters relied as constituting a contract contemplates the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored.

By the second category the respondent is in effect saying that phrase in the letter of 1 March 1976 relied upon by the appellants as constituting or forming part of a contract contemplating the execution of a further contract should fundamentally be construed as a mere expression of the parties as to the manner in which the transaction already agreed to should in fact go through and not as a condition or term of the bargain. Thus it is submitted that reference to the execution of a formal document can, in the circumstances of the present appeal, be ignored.

Here again we choose to hold that for the appellants to rely on formal execution of a contract as an essential condition of the bargain it certainly cannot be founded on the basis of the letter of 1 March 1976 **but fundamentally on a finding of fact**, if any, that in the circumstances of this case it was indeed a condition or term of the contract. No such finding was made by the learned Judge and we see nothing to contradict that finding. Even assuming for a moment that term "subject to contract" as contained in the appellant's letter of 3 March 1976, we see no reason to construe the phrase as anything more than, to borrow the words used in *Von Hatzfeldt-Wildenburg's* case, "a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through". We refer to and respectfully agree with the exposition of the principle in *Master v. Cameron* 91 CLR 353 cited with approval in *Daiman Development Sdn. Bhd. v. Matthew Lui Chin Teck* [1981] 1 MLJ 56. (Emphasis supplied)

Once again I remind myself that it is not my function at this stage to decide whether there is a concluded contract between the parties. Suffice that I am satisfied that there is abundant evidential backing for the plaintiff's claim for an injunction on this point.

Secondly, the plaintiff has sought to rely on an estoppel to support its cause of action against the defendant. Now, it is a maxim that estoppel may be used only as a shield and not as a sword. However, a careful analysis of the law on this subject shows that the maxim adverted to is really a matter of semantics. Thus, in *Dawson's Bank Limited v. Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at 108, Lord Russel of Killowen speaking on behalf of the Privy Council said:

> The question of estoppel is governed by s. 115 of the Indian Evidence Act, which for the present purpose seems to their Lordships not to differ from the law in England in regard to estoppel *in pais*.
>
> Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.

Section 115 of the Indian Evidence Act 1872, which was under consideration by the Privy Council in *Dawson's Bank* is *ipissima verbis* s. 115 of our Evidence Act. The statement of the principle by Lord Russel may therefore be treated as forming part of the jurisprudence of the common law of Malaysia.

In my judgment, the question whether the defendant ought to be estopped or (to put it more appropriately) the plaintiff ought to succeed on a cause of action supported by an estoppel is essentially one of the fact that has to be determined after hearing oral evidence that is tested by cross-examination. This is a matter upon which I cannot and ought not to pronounce a concluded view one way or the other at this stage. It is a matter which must be investigated at the trial. The principles applicable are neither arbitrary nor rigid but are substantially equitable. The result depends, not upon the satisfaction of fixed prerequisites, but upon the answer to the question whether it is unjust, unconscionable or inequitable for the defendant to go back upon an assumption which he has knowingly or unknowingly caused or permitted the plaintiff to make: *Lim Teng Huan v. Ang Swee Chuan* [1992] 1 SCR 249 (PC). In this case, that principle or test has to be applied to the allegation contained in paragraph 14 of the statement of claim which the defendant has clearly traversed.

Having come to the conclusion that there are serious questions to be tried I have to take the next step, which is to consider the balance of convenience. I have weighed all that has been said on behalf of both litigants before me and I am firmly of the opinion that the balance of convenience lies squarely in favour of continuing the injunction. In the first place, it is the plaintiff who is in possession of the premises in question. If I refuse the injunction and the plaintiff is dispossessed, greater injustice will, in my view, be brought to bear upon it so that an award of monetary compensation will not be a sufficient remedy in the event that it succeeds at trial. On the other hand, if the injunction is permitted to continue, any injury that befalls the defendant in consequence may readily be remedied by an award of damages which will be the income that the defendant would have derived for having been wrongfully kept out of possession. Secondly, the object of an injunction being to maintain the *status quo,* that object is met better by continuing the injunction than refusing it.

In arriving at my decision on this part of the case I have followed the judgment of the Federal Court in *Si Rusa Beach Resort Sdn. Bhd. v. Asia Pacific Hotels Management Pte. Ltd.* [1985] 1 MLJ 132 where at p. 136 Abdul Hamid CJ (Malaya) (now Lord President) had this to say:

> Since there are serious factual questions as well as points of law that need to be tried, the question of the adequacy of compensation by an award of damages cannot therefore be properly determined. In that event and since there is a doubt what remains to be considered is the question of balance of convenience. And in this regard "where other factors appear to be evenly balance it is a Counsel of prudence to take such measures as are calculated to preserve the *status quo*". (See *Cyanamid's* case *(supra)* at p. 511).
>
> The question is what, in the instant case, should that *status quo* be? With respect to the learned Judge it would seem to us that his finding that the balance of convenience lay in favour of the Operator, was based solely upon the consideration of the loss to be sustained by the Operator in the event the interim injunction being withdrawn omitting however, to consider what we think is an important factor, and that is that at all material times the Owner was in possession and control of the Hotel. Besides, all the licences to run a boarding house and restaurant, sell liquor, operate billiards, flipper machines and so forth were all in the name of A. Chelliah personally. That being the case the Operator cannot possibly run the Hotel and manage the whole operation without first obtaining the necessary licences.
>
> These are some of the matters which need to be taken into consideration in the present case to decide where the balance of convenience lies. There were other factors which ought also to have been taken into consideration, namely, the fact that the Owner had been operating and living there and the fact that the respondent company is a foreign company with no assets in this country.
>
> They need to be considered to decide whether *status quo* should be maintained. In our judgment if the *status quo* is to be maintained the only order that can properly be made at this stage is to allow the Owner to continue to run the Hotel until the action is finally litigated and a decision made thereon.

See also *Holiday Inns Inc. & Anor. v. Hotel Enterprises, Ltd.* [1976] 1 MLJ 213.

It is to be noticed that the facts of *Si Rusa* are not entirely dissimilar to the facts of the case before me save and except that the roles were reversed; the owner was in possession there whereas here the managers are in possession.

In *Films Rover International Ltd. & Ors. v. Cannon Film Sales Ltd.* [1987] I WLR 670 Hoffmann J. put the principle in these words:

> I would respectfully agree that there is no inconsistency between the passage from Megarry J. and what was said in the *Cyanamid* case. But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as "guidelines". i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the Court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from the principle.
>
> The passage quoted from Magarry J. in *Shepherd Homes Ltd. v. Sandham* [1971] Ch. 340, 351, qualified as it was by the words "in a normal case", was plainly intended as a guideline rather than an independent principle. It is another way of saying that the features which justify describing an injunction as "mandatory" will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage unless the Court feels a "high degree of assurance" that the plaintiff would be able to establish his right at a trial. I have taken the liberty of reformulating the proposition in this way in order to bring out two points. The first is to show that semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren. The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term "mandatory" to describe the injunction, the same question of substance will determine whether the case is "normal" and therefore within the guideline of "exceptional" and therefore requiring special treatment. It if appears to the Court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the Court does not feel a "high degree of assurance" about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.

I am conscious of the fact that in that case what was under consideration by Hoffmann J. was essentially a mandatory injunction. However, having read and re-read the relevant passages in that learned Judge's judgment I am satisfied that the principles he laid down are of general application and I have derived much assistance from the passage I have quoted in coming to my own decision in this case.

On a full consideration of all the relevant facts and circumstances, I am satisfied that the plaintiff will be in a position to meet its undertaking in damages should it fail in the final event.

For these reasons, I exercised my discretion and made an order in terms of the plaintiff's application and directed the injunction to continue until trial.